No. 4481

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

FRANK C. BERTELMANN, Appellant

vs.

MARY N. LUCAS, et al, Appellees.

Appeal from the
Supreme Court of the Territory of Hawaii.

REPLY BRIEF OF APPELLANT.

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ANSWERING BRIEF OF MARY N. LUCAS AND CHARLES LUCAS.

In the opening brief (p. 13 to 18) appellant cited some of the numerous authorities holding that all parties having an interest in the subject matter of an equity suit should be made parties, and followed those citations with others defining what is the subject matter of a suit. We are now convinced from the authorities, having found none to the contrary, that the property in relation to which this suit is being prosecuted is the subject matter.

The Appellees say on page 14 that "The subject matter of a suit is not the physical property whose ownership is disputed, but the controversy as to title," and in support thereof cite two authorities. The first is the case of State vs. Muench, 117 S.W. 25, a special proceeding in which a writ of prohibition directed to a

Circuit Judge was issued. The court quoted at p. 29, "The subject matter of a suit, when reference is made to questions of jurisdiction, is defined to mean 'the nature of the cause of action and the relief sought.' "

The second is the case of Reed vs. Muscatine, 73 N.W. 579, which was an action at law to recover damages for personal injuries, and the court there said in passing on the question of jurisdiction, "The subject matter is the right which one party claims against the other, and demands judgment of the court upon."

No land, no thing, no chattel was the subject matter of either of said actions.

Out of the thousands of cases involving misjoinder and multifariousness learned counsel have selected those cited in their brief as most nearly sustaining their position. Without taking up the time of the court with a review of each of them, we insist that a comparison of the facts in the case at bar will clearly distinguish them.

It will be noted that in raising any apparent objection to prosecuting this suit in equity and against all of the litigating respondents counsel never present the case in its entirety but invite the Court's attention to one particular angle of the controversy. That is not the way to reach a just conclusion. As we pointed out in our opening brief (p. 33) the lower court followed counsel for appellees and never did consider the case as a whole. We there said: "An examination of the opinion will disclose that the court failed to consider as bearing on this question, the pendency of the action of

ejectment wherein McCandless and associates are parties; that the common source of any title involved is the will of Christian Bertelmann; that all parties are interested in the construction of the will, and in the application of its construction to the facts that have since arisen; that each of said parties is interested in the subject matter, and in the results of the suit; that petitioner could not get a complete record title without resort to this court; that petitioner could not get complete relief in any other way; that any separate suit would leave petitioner in a situation which would be embarrassing and inconsistent with equitable principles; that such a suit would involve questions a determination of which would affect the interests of the other parties." Counsel have not denied, and they can not deny that we are right in this statement.

Counsel, on the authority of Tribetts vs. Ry. Co., 12 So. (Miss.) 32, seek to repudiate the doctrine that a mere community of interests in the question of law and fact involved in the controversy is sufficient to justify equity jurisdiction to prevent a multiplicity of suits. For authority to the contrary we refer to Commodores Point Terminal Co. vs. Hudnall, 283 Fed. 150 (at p. 174); note 131 Am. St. Rep. at p. 40; Hale vs. Allison, 188 U.S. 56; Montgomery L. & P. Co. vs. Charles, 258 Fed. 723, and authorities there cited; Commonwealth Trust Co. vs. Smith, 69 Law Ed. U.S. 86.

In this case, however, we are not dependent on the principle stated to sustain our bill. There is more connection between the parties than "a mere community

of interests in the question of law and fact involved."

We invite the Court's attention to the "review" by appellees of the case of Commonwealth Trust Co. vs. Smith, 69 L.Ed. U.S. 86. They ignore completely the following announcement of principle by the Supreme Court in passing on the question as to who were necessary parties in that case: "Of course they were, if they had such an interest in the matter of controversy that it could not be determined without either effecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity. Shields vs. Barrow, 17 How. 130, 139, 15 L. Ed. 158, 160."

If appellant had sued Mrs. Lucas and/or the Scotts, a decision as to whether or not appellant had complied with the terms of the will would affect McCandless and associates. If he brought action against McCandless and associates, the other litigating parties could embarrass him by moving on the pending ejectment suit for trial, and in order to prevent that embarrassment it would be necessary to bring them in as parties and injoin the suit at law.

Counsel in presenting their side of the case have not answered, or even referred to what we have said with reference to the application of said authority (Ib. 69 L. ed. 86) to the case at bar (our Brief 35-36), and have signally failed to distinguish it.

Appellees content themselves with the bare assertion that in this suit the issues between appellant and the different parties "would have to be tried just as sep-

arately as they would if they were made in seperate suits, because the nature of those issues and the evidence concerning them would be entirely distinct and unconnected." In our opening brief, pages 28-31, we called attention to the fact that the same evidence covering the main point in this case would have to be taken in any separate suit, and appellees have failed to answer the argument there advanced.

If by the tender in performance of the conditions prescribed by the will appellant acquired legal title from Mrs. Lucas and the Scotts; and if thereby the preceding estates were terminated, and all instruments purporting to convey any interest therein were of no effect in so far as appellant's newly acquired title is concerned; if appellant is not entitled to have those various instruments which are of record cancelled as clouds on his title; if appellant is not entitled to conveyances, nor to a decree of court, in order to perfect his record title; and if McCandless and associates are not interested in the tender in performance; if appellant can retain his bill against McCandless and associates without making the others parties in order to prevent a trial of the ejectment suit before a determination of the equities; if as against Mrs. Lucas and the Scotts his only right of action is for possession and for rents; if all of these concur, the bill is objectionable, and appellant should be required to amend or have his bill dismissed.

On page 38 of their brief appellees say, "If the alleged tenders to Mrs. Lucas and the Scotts were prop-

erly made and thereby the petitioner acquired equitable interests in the land, we concede that a bill to compel conveyances would be in order and that in that case a court of equity could incidentally construe the will in deciding whether the petitioner was a 'shortcoming' son." We appreciate this concession as it makes it unnecessary to further discuss those questions. Appellees also say (pages 39-40), "On page 79 of their brief, counsel for the Appellant point out a distinction between an estate upon condition and a conditional limitation. Mrs. Lucas, as the grantee of the several daughters of the testator took whatever the daughters had to convey. It seems to us that the estates of the daughters were conditional limitations. But if they were estates upon condition, then, upon the law cited in the Appellant's brief, the Petitioner should have made an entry in order to defeat them." From which it appears that counsel for these appellees agree with us that Mrs. Lucas acquired "whatever the daughters had to convey" which included of course the right to be paid $5000. for each interest. It is also clear that they, like ourselves, have some doubt as to whether the estates of the daughters were conditional limitations or estates upon condition, they now inclining to the former conclusion, whereas heretofore they were inclined to the latter. We do not assume counsel mean that in the case of an estate upon condition they are of the opinion an entry is necessary to confer an **equitable** title. We have seen no authority to that effect, and counsel do not cite any.

Learned counsel say (p. 59), "If the testator had not cared whether the sons would have the land he would not have made the provision as he did. **He certainly did not wish his daughters' estates to be defeated by land speculators or contingent fee lawyers."** If they refer to the efforts of Mrs. Lucas to acquire the whole of these lands at a nominal price we follow them. For a stranger like Mrs. Lucas to acquire this plantation for a small consideration and defeat the will of the testator is indeed foreign to his wish as expressed in his will. They use the words "land speculators" advisedly. Mrs. Lucas speculated on the interests of the daughters and short-coming sons before the time for performance of the condition arrived. She has speculated on the inability of a son of the testator to "furnish, produce or raise" the necessary money with which to purchase the other interests. She has speculated on the performing son's failure to find her hiding place when the time came to pay the money. She has speculated on securing from the sons their personal privilege to acquire the whole of the land. She is now speculating on a possible mistake of the performing son in having offered the money to her instead of to his sisters and brothers whose entire rights in the premises she has used every effort to obtain. If counsel refer to these facts they are right in saying the testator did not intend that land speculators should defeat the estates of his children.

While Mrs. Lucas stands out preeminently as the "land speculator," counsel doubtless meant McCandless and associates, as they couple "contingent fee lawyers"

with "land speculators." As we have stated, these parties took advantage of petitioner's necessity and drove an unconscionable bargain. They seek to get two-thirds of petitioner's land for services, including the use of $40,000.00 for purpose of tender, all of which is worth perhaps less than $5,000.00.

We fully agree that it would not be in accord with the intent of the testator for either of said land speculators or contingent fee lawyers to win in this suit.

Appellees say (p. 60), "The testator's intention clearly was that the payment of $5000. should be made by the son or sons personally to the daughters and short-coming sons personally." We do not agree with this assertion, and have searched their brief in vain for logical reasoning to sustain this position. However, if appellees were right, as we stated in our opening brief (88 to 91), the daughters and short-coming sons had waived the right to be paid and had estopped themselves from claiming it; furthermore, they have been made parties to this suit and are not contesting. Counsel have not denied the force of our argument on this point, nor have they questioned the correctness of our conclusions.

We have urged in our onpening brief that if petitioner had made a mistake and tendered the money to the wrong people equity would relieve him against a forfeiture of his rights. We have also insisted that if petitioner had been prevented from performing by violent means, if he showed a readiness and willingness to perform, he would be entitled to relief in equity. Oppos-

ing counsel have not replied to these arguments, contenting themselves with taking the position that there must be a strict and literal performance which could only be accomplished by payment to the living daughters and short-coming sons. If their position is correct, although a son might be ready and willing to perform, if prevented by any means whatever from actually paying the money to the right parties, his right to purchase would be forfeited. We respectfully insist that this is a narrow and technical construction of the conditions imposed by the will, and not in accord with the intent of the testator as expressed therein, nor in harmony with the former decision of this court.

COMMENTS ON BRIEF OF KILAUEA SUGAR PLANTATION COMPANY

As throwing light on the general attitude of appellees in this case, one of the illuminating suggestions in this brief is found on page 3 thereof where counsel join in the request of appellant that this court decide the fundamental questions involved **provided the decision is against the appellant.** In other words, this indicates that it is not justice and equity they desire but a short cut to a final determination that a stranger to the will has defeated the wish so dear to the heart of the testator, and has by money-power and strategy, as arrayed against the characteristic trust and innocence of a descendant of the Hawaiian race, wrested from him for a small consideration a plantation of considerable value.

We do not ask for Appellant any such inequitable and one-sided consideration. With that inherent kindness of heart and love of justice found among his people, Appellant asks this court to decide the vital questions involved whether such decision be for or against him.

Appellee seems to base this one-sided request upon the theory that it would be easier for this court and for counsel if such decision went against Appellant, as the case would thereby be terminated without the trouble of going into other questions involved. Not for one moment does the appellant countenance the suggestion that the court or counsel would, under any circumstances, select the easy way at the expense of justice, or be influenced to any degree by such a consideration.

Counsel charge (Brief p. 24) that appellant "squandered what he had at the outset." We respectfully submit the charge is not justified by the record, nor (if we may be permitted to digress) by facts outside the record. It is true he mortgaged his interest to Mrs. Lucas, and was sued for a small amount while out of the Territory, but this does not justify the serious reflection upon him which is necessarily involved in the charge that he "squandered" his property. Appellee also refers to an alleged scheme on the part of appellant "to do his brothers and sisters or their assignees or heirs" out of the land (Brief p. 31). If there is any scheme to "do" anyone disclosed by the record it is the inequitable scheme by which Mrs. Lucas, a stranger to the will, sought to defeat the will of the testator and acquire

the plantation while she was holding as trustee for a performing son (Opening Brief p. 58 to 64). (Appellee has not questioned the correctness of the conclusion that she was holding as trustee, nor cited any authority to the contrary). The other outstanding "scheme" to "do" anyone, if any such is shown by the record, is the effort of McCandless and associates to acquire a two-thirds interest in the property in controversy by driving an unconscionable bargain. We respectfully submit learned counsel are not justified in making the charge that appellant is seeking to "do" anyone out of anything. The record discloses an honest effort on the part of appellant to acquire that which he believes to be justly his, and if in seeking to accomplish that result he was driven to seek aid of those who took advantage of his necessity, it is indeed a misfortune but not a crime. Appellee insinuates that appellant has not come into equity with clean hands but neglects to refer to any fact bearing out his unjust insinuation. At this stage of the case we feel that a counter charge would be puerile and out of place. Appellant has come into court offering to do equity to all parties.

Appellee urges that the performance of the condition would ipso facto bring about the transfer of the estate; the effect of which is to say that if petitioner acquired any title by the tender in performance it was a legal title. And yet counsel have urged and the courts seem to have held that the estate taken by a son or daughter in the first instance was an estate upon condition, not a conditional limitation, and as said in 18 C. J.

301, an estate dependent upon a condition is not terminated ipso facto by the happening of the event upon which it may be defeated, while in the case of a limitation it passes at once upon the happening of the event which fixes the limitation. The following authorities there cited sustain the text: Hess vs. Kernen, 149 N.W. 847; Cumberland County vs. Buck et al, 82 Atl. 418; 1 Washburn Real Property 457-461; 2 Blackstone 155. The rule for determining the question is set forth in the cited authorities. This question is discussed in our opening brief, pages 78-81 and 90-95.

We contend that appellant is properly in a court of equity whether he acquired a legal or an equitable title by the tender in performance.

Elsewhere (Opening Brief p. 85 to 109) we have anticipated counsel's argument that the tender should have been made to the daughters and shortcoming sons personally.

With reference to Catherine's interest, we there called attention to the following words of this court in the case of Lucas vs. Scott, 239 Fed. 450, at page 455: "The 'daughters or surviving daughters' referred to in article third are not the daughters who shall survive the lease, but those who shall survive the testator." "If the testator's purpose had been otherwise, he would have indicated by the word 'then' in article third **that the surviving daughters whose rights the sons might purchase were those who survived the lease.**" Catherine survived the testator, therefore this court has already decided that a perfoming son could purchase her

interest. Counsel have spent much time and space in insisting that Catherine's interest could not be purchased after her death, but please note an entire absence of comment with reference to the quoted words of this court even after we insisted in our Opening Brief (p. 117) that the question was decided.

On page 14 of brief in its behalf this appellee says, "appellant's inference that a conveyance by a short-coming son or daughter of his or her ninth interest to Mrs. Lucas would carry with it the right to be paid the $5000" is obviously a mere conclusion. It is evident from the averments of the bill (Tr. p. 11) and from the facts before the court in the case of Scott vs. Lucas, that the daughters and short-coming sons conveyed to Mrs. Lucas every right they had in the premises. Unfortunately the conveyances from them to Mrs. Lucas were not attached to the bill as exhibits, and we are not permitted to go outside the record, but it is averred in the bill that said parties had sold to Mary N. Lucas their right to be paid $5000. each under the conditions of the will (Tr. p. 11).

Notwithstanding this averment counsel say (Brief p. 17), "They did not transfer or relinquish their right to the $5000 in case it should be paid. If they had they naturally would have asked a higher price xx." There is nothing in the record which even indicates that they did not ask **and receive** a higher price because of the transfer and relinquishment to which counsel refer.

While we have discussed this point we insist that even if there was no averment in the bill other than

that the daughters and short-coming sons, except Catherine, had sold their interests in the land to Mrs. Lucas, it would be sufficient to sustain our position as the right to be paid the $5000. went with the land.

Counsel have not attempted to answer our argument that the daughters and short-coming sons had waived any right they had to receive the $5000. each, had estopped themselves by conveyances from claiming it, and after being made parties to this suit had suffered decrees pro confesso to be entered. (Appellant's Brief 88 to 91). Neither do they deny that equity has jurisdiction to relieve appellant if he made a mistake and tendered to the wrong people.

Counsel call attention to a manifest error in the citation of authorities on page 84 of our opening brief. The authorities there cited are applicable to other points involved; and some of those intended to be there cited with reference to option contracts and the respective rights of parties thereunder are: Hildreth vs. Shelton, 46 Cal. 383; 27 R.C.L. 560-563 and cases there cited; Smith vs. Bangham, 104 Pac. 689.

On page 25 of its brief this appellee insists that in order to purchase the other interests under the terms of the will a performing son must perforce own his original base fee at the time of performance. No such condition is imposed by the will. If all three sons had sold their vested interests they could yet perform by paying the daughters $5000. each. Appellee asks if they would have to tender or pay their own assignees. Certainly not. Counsel have urged that the language of the will is to

be literally and strictly construed in so far as it relates to the performance of the condition, and that payment must be made directly to the daughters and not to their assignees or heirs. Then, how can they now insist that it would not be a strict and literal performance if the surviving sons paid $5000. to each of the daughters? By what logic do they now arrive at the conclusion that a new clause not written in the will was there by necessary intendment? We submit they are not consistent. The assignees of the sons could only acquire an estate upon condition, as that was all their grantors could convey. The performance of the condition (the payment of $5000. to each of the daughters) would put an end to the preceeding estate according to all the argument elsewhere in appellee's brief. Of course we do not agree with counsel that the condition precedent must be so strictly and literally construed as to over-ride the manifest intent of the testator. While this court (239 F. p. 457) did announce the general principle that conditions subsequent working a forfeiture, should be strictly construed, yet on page 454 you said, "Having become convinced of the general purpose of the testator, we are to be guided by that rather than by arbitrary or technical rules."

It should be borne in mind that when this court rendered the opinion in said case it was on an agreed statement of facts containing the following: "Mary N. Lucas, the plaintiff in error, has by various conveyances acquired all the right, title and interest of the three sons and the five living daughters of the testator under

the will" (239 F. at p. 451).

Counsel insist that the Sheriff levied on and sold petitioner's equity of redemption, and that such was the interest purchased by and conveyed to Mrs. Lucas by the Sheriff. **Such was not the case.** It is averred in the amendment to the bill (Tr. 81) that the sheriff "attempted to convey to the said Mary N. Lucas all the interest which petitioner would have in the lands in controversy in the suit after the expiration of the lease to the Kilauea Sugar Company, describing the same as a one-third interest." No present interest was sold or conveyed. As expressly stated in the conveyance, the attempt was to sell and convey an interest which it was expected Frank Bertelmann would have after the expiration of the lease to the Sugar Company, and said contingent interest was not subject to levy and sale.

Counsel complain (Brief p. 21) that we ignore altogether the case of Scott vs. Lucas, 23 Haw. 338. On pages 68 to 73 of our opening brief will be found quotations from and comments on that decision. We do not agree with counsel that it is stare decisis on either of the two points considered. In the first place petitioner was not a party; in the second place it was submitted on an agreed statement of facts which was untrue in part; and, in the third place this court held directly to the contrary on one of the points, and, although saying in the opinion that "We need not pause to consider whether or not the court below correctly held that the sons' right to acquire Catherine's interest ceased with Catherine's death, as being thereby rendered impossi-

ble of performance," yet we insist this court really decided the principle which would control that point when you said on p. 455 of the opinion, "If the testator's purpose had been otherwise, he would have indicated by the word 'then' in article third that the surviving daughters whose rights the sons might purchase were those who survived the lease."

The court did not pause to consider this point any further for the additional reason that the court was incorrectly informed that Mrs. Lucas had acquired by conveyances all of the right, title and interest of all the sons and daughters, except Catherine, and neither of the sons was a party.

We have heretofore considered the question of laches (Appellant's brief 40-45), and avoid further repetition.

It is respectfully submitted that appellee has carefully refrained from reference to our arguments showing that it would be utterly impossible for appellant to get adequate relief at law, or by separate suits. We urged (Brief 18-19) the interest of parties, and (Brief 21-22) showed why they would probably all have to be brought in if a separate suit was filed, and yet counsel content themselves with citing authorities where the facts were entirely different from those in the case at bar, and in which there were no such complications as face this appellant. Counsel ask (His brief p. 32), "Was there ever such a conglomeration of matters not only equitable but both equitable and legal combined in a single bill?" Just here counsel have inadvertently touched upon a potent reason for the exercise of equity

jurisdiction. A conglomeration is "an accumulation into a mass," and carries with it the idea of "a collection cemented together." And that is just the situation in which appellant finds himself. He is face to face with a number of matters and parties cemented together into a mass. He must attack the whole "conglomeration" or give up in despair, as it is outside the range of possibility to break the cement and divide the collection. Indeed, "A court of common law can give no relief in such a case, and if equity cannot do it then is the case a hopeless one."

The parties to this suit are so united by the pending action of ejectment, the tender in performance, and interest in the subject matter, that it would be impracticable, if not impossible, to proceed otherwise than by joining them.

ANSWERING BRIEF ON BEHALF OF APPELLEES ALUI AND LANE.

The agreement made by appellant with these appellees and McCandless is set out in the record (Tr. 29 to 34). The conveyance from petitioner to these appellees and McCandless is also in the record (Tr. 38 to 41).

It is averred (Tr. 41) that Aluli and Lane procured the execution of said conveyance by fraud, and the facts relied on are set out (Tr. 41-44).

Appellees apparently concede that we have correctly stated the law applicable to this angle of the case in our opening brief (122 to 124) as they neither comment on

the authorities there cited nor refer to any holding to the contrary.

The brief to which we are now replying purports to be on behalf of appellees, Aluli and Lane. The sole argument on behalf of the latter is contained in these words found on page 6: "Respondent Lane performed services for Petitioner." At all events it is brief if not convincing.

Counsel Aluli frankly admits that "the breach was caused by Petitioner because together with McCandless he and they wanted to get another lawyer" (p. 9), and he says further (p. 10), "The case was taken out of the hands of Aluli by Petitioner, and the delay, if any, cannot be attributed to him."

It is averred in the bill that neither Aluli nor Lane appear as attorneys on the complaint in ejectment (Tr. 45). On page 11 of his brief appellee says: "The silence of Petitioner for six years confirms our contention that he displaced the services of Aluli for Peters."

It seems to us from a review of the authorities that Aluli would at most, in the absence of fraud and unfair dealing on his part, be entitled to a reasonable compensation for services actually performed, and, **if dismissed without cause,** to damages for breach of contract. If any good and sufficient reason existed for a change of attorneys it is clear that he would only be entitled to compensation for actual services. The cases are collected in Dec. Dig., Attorney and Client, Key Nos. 75 and 134.

"A contract made by an attorney with his client in

relation to an interest to be acquired by him in the subject matter of pending litigation is presumptively fraudulent, and the burden is upon the attorney to prove the fairness of the contract, the adequacy of the consideration, and that it was in all its essential and material parts equitable, and that no undue advantage growing out of the relationship of attorney and client has been practised in its procurement."

Boyle vs. Read. 138 Ill. App. 153.

Bolles vs. O'Brien, 59 So. 133.

Petitioner offers to do equity (Tr. 38) and "to pay said Noa W. Aluli the reasonable value of his services rendered, which he prays the Court to ascertain after hearing. And if this is not sufficient offer to do equity, petitioner here now offers to do whatever the Court may upon hearing find to be equitable and right in the premises to said Aluli and said Lane and each of them."

We are not seeking to offset, at least not at this time, the evidence offered by counsel in support of his competency, said evidence being the records in cases before this court numbered 3099 and 3391, to which he calls the Court's attention in his brief at page 11.

AS TO APPELLEE McCANDLESS

We have not yet been served with reply brief on behalf of Appellee McCandless.

In the court below counsel cited authorities seeking to sustain his position on the ground that after one gets the benefit from a void contract he cannot have the con-

tract set aside in equity. A review of those cases will disclose that they are clearly distinguishable from this case.

They cited other authorities where the courts declined to set aside contracts between parties where they were freely and voluntarily entered into and no undue advantage was taken. The facts set out in the bill make those authorities inapplicable.

They did not cite any authority contrary to the principles declared in the case of Pironi vs. Corrigan (N. J.), 20 Atl. 218, where it was held: "If conveyance for land be made for a consideration in services afterwards to be performed by the grantee, and the grantee fails to perform, the conveyance will be set aside at the instance of the grantor. When confidential relations exist between two persons resulting in one having influence over the other, and a business transaction takes place between them resulting in a benefit to the person holding the position of influence, the law presumes everything against the transaction, and casts upon the person benefitted the burden of proving that the confidential relations had been, as to the transaction in question, suspended, and that it was fairly conducted, as if between strangers."

Neither did they controvert the authorities sustaining our position that a sale of property by a client to his attorney will be set aside unless the sale was fair, the price adequate and the conduct of the attorney equitable, and that the same rule will apply to a co-purchaser with knowledge of the relationship of attorney and client.

The cases they relied on in the court below to sustain their argument that there was a subsequent ratification of the conveyance to McCandless and associates by Appellant did not apply to the facts made by the bill, and furthermore there is no demurrer on the ground that the bill shows a ratification of the conveyance by petitioner. In fact all the grounds of demurrer are based on the wrong theory that Appellant claims relief against McCandless on the ground of mistake. (Tr. 117-120).

If the agreement and conveyance to McCandless and associates is allowed to stand, in the event of Appellant's success, McCandless would claim (1) four-ninths of all rents since the date of the convyeance, (2) a refund of all expenses incurred by him, with interest, (3) the $40,000. used for purposes of tender with interest thereon, and (4) a four-ninths interest in the land. If anything was due on the Lucas mortgage that must be paid out of Appellant's share.

In other words, for the use of the money for purposes of tender, McCandless is to get a four-ninths interest in the land free and clear of all expenses and charges; all expenses, including the $40,000. and interest thereon, are to be deducted from the three-ninths interest reserved to Appellant! !

AS TO THE SCOTT HEIRS AND BISHOP TRUST COMPANY

These parties have not yet served us with brief, and

we can not longer hold up this reply if same is to be printed before the hearing.

IN CONCLUSION

Although the court below discussed only two grounds of demurrer, namely, multifariousness and adequate remedy at law, the real and vital questions, a decision of which will determine the rights of the parties, are before this court and have been argued at length by both sides. We earnestly request a decision of those fundamental questions at this time. As opposing counsel have somewhere said, the appellant "is a poor man," and it is apparent from the record that this is a case of long standing. If our contention is correct, appellant is being kept out of property that should be his, in the meantime undergoing the financial strain and mental anxiety of expensive litigation. If we are wrong, then appellees are being annoyed and put to useless expense.

If the bill has equity, and we submit it clearly has, it should not be dismissed even if held to be multifarious. In that event the petitioner should be given the opportunity to amend.

It should not be dismissed on the ground that petitioner has an adequate remedy at law because a local statute provides as follows:

"Transfer of action at law erroneously begun in equity—If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only

alterations in the pleadings as shall be essential. (L. 1923, C. 104, S. 1)." Sec. 2467 Revised Laws of Hawaii, 1925.

All of the parties to be affected by a determination of the vital questions involved are now before the court, and no injustice could be done to any one by a decision thereof at this time. Indeed it is to the interest of all parties, and to the courts as well, that the main points at issue be considered and determined. Three times already the Supreme Court of Hawaii has had before it questions involving the rights of some of the parties in connection with the will of Christian Bertelmann, and for the second time this Court is called upon for a decision in that regard. Not until this proceeding was instituted have all of the parties tracing their claims to said will as the common source of title, been before either of said courts in the same case.

We therefore most respectfully insist that this Court hand down an opinion which will put at rest the vital questions involved in this suit.

Respectfully submitted,

Norman D. Godbold

Of Counsel for Appellant.

Honolulu, T. H., May 1st, 1925.